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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 464

PAUL BIAZEVICH, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-16) is reported at 374 F. 2d 974. The Board's decisions and orders are reported at 136 NLRB 13 and 136 NLRB 1 (Pet. Apps. B and C).

JURISDICTION

The decision of the court of appeals was issued on January 6, 1967, and a petition for rehearing was

denied on May 9, 1967 (Pet. 3). The petition for a writ of certiorari was filed on August 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner boat owners violated Section 8(a)(3) of the National Labor Relations Act by discharging their crews in order to avoid dealing with a disfavored union.

2. Whether the court of appeals properly found that petitioners were not prejudiced by the Trial Examiner's revocation of subpoenas served on Board employees, and by his refusal to examine certain memoranda to determine whether they should be made available to petitioners for purposes of cross-examination.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set out in Appendix D of the petition.

STATEMENT

A. The Unfair Labor Practices Found By The Board

Petitioner boat owners operate fishing vessels in Southern California. In 1955, the fishermen on these vessels were represented by Fisherman's Union, Local 33, ILWU ("Local 33"). Under the collective bargaining agreement the crew's wages consisted of a specified share of the gross proceeds of the catch

(R. 719; G.C. Ex. 33-34, Tr. 1979, 2001).[1] However, if the price paid for the fish fell below levels specified by the agreement, the crew was to receive a minimum guarantee per ton (R. 719; G.C. Ex. 33-34, Tr. 1979, 2001, 2132-2143). In 1955, tuna prices declined to a level where the minimum-guarantee provisions of the contract became operative. In April 1955, at the boat owners' request, Local 33 induced the fishermen to accept payment on a straight percentage basis without any guarantee and, in June, Local 33 induced the crew to accept another reduction in wages. (R. 984, 714; G.C. Ex. 34, 35, 38, 42, Tr. 2010, 2096, 2130-2143). Thereafter, the crews refused to accept any further cut in wages, which were already substantially lower than those to which they were contractually entitled (R. 984; G.C. Ex. 45, 46, Tr. 494-495, 2096, 3539-3542). The masters elected not to fish for tuna on a minimum guarantee basis, and laid up their vessels (R. 719; Tr. 203-204, 146, 2928, 3403-3404, 3577-3578).

Other vessels, represented by petitioner Seine & Line Fisherman's Union of Los Angeles Harbor, Seafarers' International Union of North America, AFL-CIO ("Seine & Line") continued to fish, however, as Seine & Line had agreed to accept payment on a straight percentage basis (R. 720; Tr. 3668). Accordingly, beginning in August 1955, petitioner boat owners began to inform their crews, most of whom

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[1] "R." refers to Vol. I of the record certified by the court of appeals. The remaining references are to the transcript of testimony and the exhibits in the other Volumes of the certified record.

were Local 33 adherents (G.C. Ex. 69, Tr. 2387), that at the end of 1955 when they could terminate their contract with Local 33 they intended to bargain with Seine & Line and to employ only fishermen who were members of or cleared by Seine & Line.[2]

In mid-October 1955, the boat owners, who had previously bargained with Local 33 through the Fisherman's Cooperative Association, formed the American Tuna Committee ("ATC") to represent them in future bargaining negotiations and agreed not to deal separately with Local 33 (R. 720; G.C. Ex. 47, 68C, 68D, Tr. 2096, 2292, 2521-2535, 2672-2682, 2726, 2906-2908, 2941-2942, 2947-2956). About October 27, the boat owners notified Local 33 of their desire to terminate the existing agreement on December 31. In early November, Local 33 offered to accept a minimum guarantee which was the same as the crew members would receive on a straight percentage basis, provided that the vessels began to unload within 10 days after arrival at the dock (R. 984; Tr. 2009, 2215, 2572, G.C. Ex. 50). The boat owners, through the Fishermen's Cooperative Association rejected this proposal, and

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[2] *Arlene S.* (Tr. 748-749, 981-982; Tr. 1738-1739, 1736, 1747-1751); *Sea King.* (R. 981-982, 983, n. 13, 740-742; Tr. 749, 776-777, 1000-1001, 1005-1007, 1015-1019, 1027-1029, 3575-3576); *Golden West.* (R. 731, 733, 749; Tr. 1578-1582, 1564, 1868-1869); *Sea Scout.* (R. 981-983, n. 13, 738-739; Tr. 359-360, 378-379, 423, 439-440, 473, 660, 668, 422-423, 470-471, 477, 4869-4870); *Defense.* (R. 981-982, 983, n. 13, 729-731; Tr. 126, 133, 229-230, 298-300, 643, 685-686, 1298, 1877); *Columbia.* (R. 981-982, 983, n. 13; Tr. 560-562, 582, 598); *City of Los Angeles.* (R. 981-982, 734-735; Tr. 1387-1388, 1472-1473, 1898-1901, 2321-2323, 2336-2337).

made no effort to pursue the matter further (R. 984; G.C. Ex. 50, Tr. 2009). On December 15, Local 33 wrote to ATC's counsel protesting that the contract terminations were not effective and requesting a meeting to discuss the terminations and contract negotiations (R. 720; G.C. Ex. 52, Tr. 2037). ATC's reply ignored the request for a meeting and expressed doubt as to "the right of your organization to bargain for these crews" (R. 720; G.C. Ex. 54, Tr. 2085). On December 23, Local 33 again requested a meeting and pointed out that it had been customary for the boat owners to rehire substantially all of the crew members employed during the preceding season. It stated that it was prepared to submit proof that practically all of these crew members wanted Local 33 to represent them (R. 720; G.C. Ex. 54, Tr. 2085).[3]

Once hired by one of petitioner boat owners, a crew member, if he heard nothing to the contrary from the master, expected to continue to work aboard the same vessel (R. 721; Tr. 4010, 2641-2642, 927-928, 938-939, 3099-3102, 3457, 3546, 2568-2569, 397-398, 1833, 837, 713, 938, 1087, 1998, S. Tr. 2487, G.C. Ex. 9-22). Most of the crew members followed the practice of leaving on the boat, between voyages, clean cloth-

[3] On December 27, 1955, Local 33 began to picket the vessels involved to protest the boat owners' action in terminating the agreements as they existed in 1955, and in withdrawing recognition from Local 33 as the representative to bargain for new agreements (R. 985-986, 720; G.C. Ex. 56, 59, 60; Tr. 2101, 2039-2046, 2085). This picketing continued until early January 1956, when it was enjoined by a State court (R. 720; Tr. 2047, 2079, 2590).

ing and other gear of modest value, which were useful only during fishing trips (R. 722; Tr. 3209, 3360, 400, 123-124, 1070, 1077-1078, 2585-2587, 3099-3100, 3964, 936-937, 1595, 875-876, 311-313, 437, 1551-1552, 839, 638-639, 680, 1040-1041, 1111-1112, 1306, 801, 2909-2911, 530, 1145). Prior to December 29, 1955, petitioner boat owners sent virtually identical letters (the "clothes letters") to practically all the members of their 1955 crews, telling them to remove their personal belongings from the boats. These letters were intended by the boat owners, and interpreted by the crew members, to constitute discharges. (R. 983-984, 722-723; Tr. 2537, 2590-2592, 2600, 2777-2778, 3074-3075, 3157-3160, 3257-3258, 3299-3300, 3403, 3653-3654, 3823, 3962-3964, 128-130, 233, 316-317, 360, 403, 424-425, 440, 476, 502-503, 531-532, 563-564, 607-608, 643, 661-662, 689, 706, 771-772, 786-787, 810, 841-842, 878-879, 916-917, 971-972, 1071-1072, 1086-1087, 1105, 1153, 1195, 1239, 1273, 1299-1300, 1305, 1329-1330, 1371-1372, 1389, 1418-1419, 1481, 1507, 1529-1530, 1617-1618, 1842, 1851-1852, 1875-1876, 1897-1898, 1946-1947, 2299-2301, 2323-2324.)

Immediately after mailing these letters, Skipper John Zorotovich of the *Defense*, one of the vessels involved, telephoned his old crew members and told them that he could not "work by" Local 33's contract, but that, if they could join Seine & Line, "we could still go fishing as a group" (R. 982, n. 11, 730; Tr. 3411-3412). Similarly, when several members of the *City of Los Angeles* crew went down to the boat to

pick up their belongings, boat owner Nick Gargas told them that, if they would "go in" Seine & Line, "then [they] can stay in the boat" (R. 735; Tr. 1898-1899).

Toward the end of 1955, the boat owners began to hire almost completely new crews to sail in 1956 (R. 723, 739; Tr. 3162-3163, 3194-3199, 3263-3265, 3458-3460, 3553-3554, 3623-3632, 3973-3977). Andrew Vilicich, then owner of the *Marsha Ann*, instructed the skipper of that boat not to hire even the best members of the 1955 crew because Vilicich "didn't want no one from Local 33" (R. 732-733; Tr. 1585-1586). On January 3, 1956, some of the boat owners met with their ATC counsel and a Seine & Line representative (R. 724; Tr. 3965-3966). On January 4, the boat owners signed collective agreements with Seine & Line which included, *inter alia*, union security and checkoff provisions (R. 988, 724; G.C. Ex. 66, Secs. II, IX).

On the basis of the foregoing facts, the Board found that petitioner boat owners violated Section 8(a)(3) of the Act by discharging 52 members of their 1955 crews in order to avoid dealing with Local 33 (Pet. App. B 10).[4]

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[4] The Board also found that petitioner boat owners interfered with, restrained and coerced their employees, in violation of Section 8(a)(1) of the Act, by telling employees on various occasions during the fall and winter of 1955 that they could continue to work after the end of the year only if they joined Seine & Line, and that otherwise they would be replaced (Pet. App. B 9-10). In addition, the Board found that petitioner boat owners violated Section 8(a)(1), (2), and (3) of the Act, and that Seine & Line violated Section 8(b)(1)(A) and (2), by entering into and enforcing a union-security

The Board's order, *inter alia*, requires petitioner boat owners to reinstate the discriminatorily discharged employees, and to withdraw recognition from and cease giving effect to their contract with Seine & Line. The order further requires the boat owners, jointly and severally with Seine & Line, to make the crew members whole for any loss of pay suffered as a result of the unfair labor practices, and to reimburse them for all moneys exacted from them under the illegal union-security provisions of the contract. (Pet. App. B 23-29.)

B. The Procedural Issue and the Board's Ruling Thereon

The Board hearing in the instant case began on August 5, 1957. At that time the Board's rules and regulations prohibited all agency employees from producing any documents, reports, memoranda, or records of the Board, within the General Counsel's control, without the General Counsel's written consent. The Board interpreted this rule as limiting the right

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contract at a time when Seine & Line was not the statutory representative of the employees, and which contained provisions unlawful on their face in that they (1) failed to allow non-members the 30-day grace period for joining the union afforded by the statute; (2) required employees to pay assessments as well as initiation fees and dues; (3) required employees to execute checkoff authorizations; and (4) called for forfeiture of earnings by all employees who failed to pay Seine & Line the amounts described above (Pet. App. B 18-20). Finally, the Board found that Seine & Line further violated Section 8(b)(1)(A) and (2) of the Act by entering into an unlawful union-security contract with other employers (Pet. App. C 6). Petitioners do not here contest these additional findings.

of its attorneys and field examiners to produce statements made by the General Counsel's witnesses during pre-trial investigations. *The Great Atlantic and Pacific Tea Company*, 118 NLRB 1280. Accordingly, at the original hearing the Trial Examiner upheld the refusal of the attorney for the General Counsel to comply with petitioners' demand for the production of such statements (R. 979). The hearing closed on July 9, 1958.

On August 28, 1958, the Board held that the foregoing rule was invalid to the extent that it foreclosed production of such statements for purposes of cross-examination. *Ra-Rich Manufacturing Corp.*, 121 NLRB 700 (R. 634-635).[5] Accordingly, on September 8, 1958, the Trial Examiner issued an order reversing any ruling made at the hearing which denied the request of any petitioner for production of pre-trial statements within the purview of *Ra-Rich*, requiring the General Counsel to make such pre-trial statements available to any petitioner forthwith, and

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[5] In accordance with this decision, the Board rule barring agency employees from producing documents under the General Counsel's control, without his consent, was amended to read (29 C.F.R. 102.118):

> * * *: *Provided,* After a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken: * * *.

permitting any petitioner to move to reopen the hearing for the limited purpose of further examining any witness whose pre-trial statements were within the scope of his order (R. 979; 632-635, 637). Pursuant to the Trial Examiner's ruling, the General Counsel furnished to petitioners all the pre-trial statements which were in his possession (with the one exception, discussed below).

Thereafter, the hearing was re-opened and 58 of the original 71 witnesses returned and were cross-examined on the basis of their pre-trial statements. Thirteen witnesses, whose statements had been furnished to petitioners, did not appear at the re-opened hearing. Their testimony was stricken from the record by the Board. (Pet. App. B 7).

Approximately 10 witnesses at the re-opened hearing testified to the existence of statements which were not produced. In response to inquiries made by petitioners' counsel, the attorney for the General Counsel repeatedly stated that he had searched his files and had no statements of any kind from these witnesses. (Tr. 4372, 4462-4463, 4689, 4712-4713, 4887.) He did disclose that in his search he had discovered two notebooks containing handwritten notes of a deceased field examiner ("the Filter memoranda") (Tr. 4712-4713). Petitioners' counsel requested the Trial Examiner to direct the attorney for the General Counsel to produce the Filter memoranda. The Examiner refused this request, and revoked *subpoenas duces tecum* and *ad testificandum* which had been served on representatives of the General Counsel relative to the

other alleged statements which had not been produced (Tr. 4826-4837, 5045, ATC Exh. 41-44). The Board sustained the Examiner's rulings, noting, with specific reference to the Filter memoranda, that "[n]one of these notes were signed or authenticated by witnesses" (Pet. App. B 8, n. 8), as required by the Board's rule (n. 5, *supra*).

C. The Decision of the Court of Appeals

The court of appeals found that the Board's unfair labor practice findings were supported by substantial evidence (Pet. App. A 5). Respecting the procedural issues, the court concluded that, although the Trial Examiner had erred in revoking the subpoenas and in refusing to examine the Filter memoranda to determine whether they should be produced, these errors were not prejudicial to petitioners (Pet. App. A 5-15). Accordingly, the court enforced the Board's orders in full (Pet. App. A 16).

ARGUMENT

Since the opinion of the court of appeals is correct and there is no conflict in the circuits, there is no occasion for further review.

1. The substantive issue petitioners seek to raise—whether the boat owners were privileged to lockout their employees in order to avoid "serious economic consequences" (Pet. 37)—is not presented here. The Board found, and the court below sustained its findings, that petitioner boat owners did not merely temporarily layoff their crew members but actually dis-

charged them and that the reason for that action was to replace Local 33 with Seine & Line. Petitioners' challenge to these findings raises only a substantial evidence issue, which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

In any event, substantial evidence supports the Board rejection of petitioners' contention that the discharges were made solely because the economic demands of Local 33 were impossible to meet. As the Board pointed out (Pet. App. B 13-14):

> contrary to the contention that the Local 33 demands were so inflexible that it was impossible for the boatowners to deal with that Union, the record shows that, even though Local 33 had a written collective-bargaining agreement with the boatowners covering the year 1955, Local 33 agreed on three occasions during the first 7 months of 1955 to modify that agreement to provide for progressive reductions in the rate of pay to crewmembers because of the falling price of tuna. When the price fell for the fourth time that year, the Union attempted to hold the line but, after the boatowners had refused for about 3 months to operate under the terms of the agreement, Local 33 gave in and offered to modify the written contract in certain respects, including acceptance of payment based on the market price of tuna. The boatowners, however, failed to pursue this offer of Local 33 to further modify the 1955 agreement. Thereafter, they avoided all efforts made by Local 33 to negotiate a new agreement for 1956, and, instead,

precipitately entered into a contract with Seine & Line, in which they agreed to pay the same rate which Local 33 had previously offered to accept.

Nor are petitioners aided by *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300. There the Court sanctioned a lockout in support of the employer's bargaining demands; it did not countenance such drastic action as a discharge of employees designed to oust their bargaining agent altogether. Indeed, in *American Ship*, the Court carefully distinguished the bargaining lockout there involved—"the purpose and effect of [which] were only to bring pressure upon the union to modify its demands"—from a situation where the employer "locked out only union members, or locked out * * * employee[s] simply because [they were] union member[s] * * * [or] conditioned rehiring upon resignation from the union." 380 U.S. at 312.

2. Similarly, no issue warranting further review is presented by the court of appeals' disposition of petitioners' procedural objections. Concerning the Filter memoranda, the court below agreed with petitioners that the Trial Examiner erred in refusing to examine those notes *in camera*. But petitioners would have been entitled to obtain those notes only if they contained a substantially verbatim account of the testimony of one or more of the witnesses, and the court properly found that petitioners had failed to make that showing. As the court pointed out (Pet. App. A 14):

> Before we would be able to determine whether any of Filter's notes are the type of verbatim accounts which should have been turned over for use in cross-examination, we would need an opportunity to personally examine them. But the Filter memoranda have not been made a part of the record herein. "If petitioners wished review of the trial examiner's determination as to the nature of the report, it was incumbent upon them to see that a record was presented upon which review could be had, by requesting that the memorandum be submitted to the court under seal." [Quoting *Harvey Aluminum, Inc.* v. *National Labor Relations Board*, 335 F. 2d 749, 756 (C.A. 9).]

The holding of the court of appeals is in accord with *Palmer* v. *Hoffman*, 318 U.S. 109, 116, where this Court approved a similar requirement. See also *United States* v. *Ebeling*, 146 F. 2d 254, 256, 257 (C.A. 2).[6]

The court of appeals was likewise justified in concluding that petitioners were not prejudiced by the Trial Examiner's quashing of the subpoenas which had been served on representatives of the General Counsel seeking the production of additional pre-trial statements from ten witnesses. As the court below stated (Pet. App. A 7), "the attorneys for the gen-

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[6] Nor is it material that the court below may have declined, during oral argument, the opportunity to inspect "a portion of the statements" (Pet. 28). A proffer at oral argument of only a *part* of the material in issue is not an adequate substitute for having *all* of the relevant material incorporated in the record and formally certified to the court of appeals.

eral counsel and for the charging party, in response to questioning by counsel for respondents, repeatedly stated that they had thoroughly searched their records and had been unable to find any statements other than those which they had already handed over." Petitioners' contention that they nonetheless were prejudiced rests on the erroneous premise that "the attorney for the General Counsel admittedly limited his search to 'signed statements' " (Pet. 26). But the record shows that his search was not so liimted. Thus, counsel for the General Counsel stated (Tr. 4713):

> * * * I went through all the Biazevich file[s], all the Christ Granich files, and all of the files * * * [of] several other smaller miscellaneous fishing cases where there is a possibility that there might have been some statement mislaid, and I found no statement, either signed or prepared for signature of any witness which was called, other than those which I have furnished.[7]

In view of the foregoing, there is no merit to petitioners' contention (Pet. 30-33) that the court of appeals applied a novel and unduly burdensome test of prejudice in this case. Nor is there a conflict of decisions; the cases cited by petitioners (Pet. 27-29) clearly involve different factual situations.

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[7] The transcript references cited by petitioners (Pet. 30) do not establish the contrary. Three reveal (see Tr. 4713, 5098, 5122) that the only unsigned statements which counsel for the General Counsel discovered were the Filter memoranda, discussed *supra*. The fourth reference (Tr. 4788) involves a response to a request for a specific *signed* statement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1967.

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